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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Keith Raniere,

Plaintiff,

vs.

Merrick Garland, et al.,

Defendants.

CV 22-00561-TUC-RCC

**DEFENDANTS' RESPONSE TO
MOTION FOR LEAVE TO FILE
PLAINTIFF'S STATEMENT OF
FACTS AND CONTROVERTING
STATEMENT OF FACTS IN
OPPOSITION TO DEFENDANTS'
STATEMENT OF FACTS IN
SUPPORT OF DEFENDANTS'
SUMMARY JUDGMENT MOTION**

Defendants Garland, Peters, Gutierrez and Ulrich, acting through undersigned counsel in their official capacities, respond to Plaintiff's Motion for Leave to File Plaintiff's Statement of Facts and Controverting Statement of Facts in Opposition to Defendants' Statement of Facts in Support of Defendants' Summary Judgment Motion *Nunc Pro Tunc* (Doc. 73.) The Court should deny the motion because Plaintiff's proposed documents fail to comply with LRCiv 56.1. This response is supported by the following memorandum of points and authorities and all matters of record.

Memorandum of Points and Authorities

I. Background

On May 1, 2023, Defendants filed their motion for summary judgment. (Doc. 35.) Defendants supported the motion with a separate Statement of Facts (SOF). (Doc. 36.)

1 The SOF was based on a sworn Declaration and authenticated documents. (*Id.*)

2 On May 2, 2023, this Court entered its Order warning Plaintiff that the Court could
3 dismiss his Complaint if he did not properly respond to the motion. (Doc. 37.) The Court
4 specifically warned Plaintiff that he “cannot simply rely on what [his] complaint says.”
5 (*Id.* at 2.) And the Court directed Plaintiff to LRCiv 56.1(b), which provides the
6 requirements for controverting a statement of facts. (*Id.* at 3.) Finally, the Court directed
7 Plaintiff to cite to the specific paragraph in his statement of facts that supports each
8 assertion of fact in his memorandum. (*Id.*, citing LRCiv 56.1(e).)

9 Thereafter, Plaintiff filed many motions to extend the time to respond to the motion.
10 (Docs. 38, 39, 48, 52, 55, 57, 59, 61, 63, 65, 67, 69.) The Court eventually extended
11 Plaintiff’s deadline to June 21, 2024, over one year after the original deadline. (Doc. 70.)

12 On June 21, 2024, Plaintiff filed his Response to the Defendants’ Motion for
13 Summary Judgment on Exhaustion. (Doc. 71.) Plaintiff did not file a controverting
14 statement of facts. (Docket, generally.) Plaintiff did not include references to “the specific
15 admissible portion of the record supporting the party’s position.” (Doc. 71.)

16 On July 8, 2024, Defendants filed their reply, in which they noted Plaintiff’s failure
17 to file a controverting statement of facts and failure to cite to the specific portion of the
18 record supporting his position. (Doc. 72 at 2.) The motion has been deemed ready for
19 decision without oral argument since July 9, 2024. (Doc. 37 at 5.)

20 On August 13, 2024, Plaintiff filed the instant motion, seeking leave to file a
21 statement of facts and a controverting statement of facts. (Doc. 73.) He asserts that the
22 “documents have been inadvertently omitted in Plaintiff’s previous filings due to a clerical
23 error by a staffer.” (*Id.* at 2.) He attaches his proposed statement of facts (PSOF) as
24 Exhibit A and his proposed controverting statement of facts (PCSOF) as Exhibit B. (Docs.
25 73-1 and 73-2, respectively.) Exhibit A includes nine unauthenticated documents, Exhibits
26 1-9. (Doc. 73-1 at 9-26.)

27 Paragraph 1 of Plaintiff’s PSOF cites to the Complaint in *Raniere v. Garland*, No.
28 4:22-cv-00212-RCC (*Raniere I*) (D. Ariz.). (Doc. 73-1 at 3.) Paragraphs 2, 3 and 4 cite to

1 the same document, but they appear to reference the allegations in the current Complaint.
 2 (*Id.*) Paragraphs 7-10, 12-14 and 16-17 cite to the unauthenticated documents attached to
 3 P's PSOF. (*Id.* at 3-7.)

4 Plaintiff's PCSOF does not include any citations. (Doc. 73-2.)

5 **II. Plaintiff's PSOF and PCSOF do not comply with LRCiv 56.**

6 LRCiv 56(b) provides

7 Any party opposing a motion for summary judgment must file a statement,
 8 separate from that party's memorandum of law, setting forth: (1) for each
 9 paragraph of the moving party's separate statement of facts, a correspondingly
 10 numbered paragraph indicating whether the party disputes the statement of
 11 fact set forth in that paragraph and *a reference to the specific admissible*
 12 *portion of the record supporting the party's position if the fact is disputed*; and
 13 (2) any additional facts that establish a genuine issue of material fact or
 14 otherwise preclude judgment in favor of the moving party. *Each additional*
 15 *fact must be set forth in a separately numbered paragraph and must refer to a*
 16 *specific admissible portion of the record where the fact finds support.* No
 17 reply statement of facts may be filed.

18 (Emphasis added.)

19 Plaintiff's PCSOF does not refer to a specific portion of the record supporting the
 20 party's position as to disputed facts. (Doc. 73-2.) Plaintiff's PSOF does not refer to a
 21 specific admissible portion of the record where the fact finds support. (Doc. 73-1.) In
 22 other words, despite Plaintiff's admission that he was required to comply with LRCiv.
 23 56(b) (Doc. 73 at 2), his PCSOF and PSOF simply do not.

24 Plaintiff similarly failed to follow this Court's Order. The Court warned Plaintiff
 25 that he "cannot simply rely on what [his] complaint says." (Doc. 37 at 2.) The first four
 26 paragraphs of Plaintiff's PSOF do just that. (Doc. 73-1 at 3.) The Court directed Plaintiff
 27 to "set out *specific facts in . . . authenticated documents*" to contradict Defendants' facts
 28 "and show that there is a genuine issue of material fact for trial." (Doc. 37 at 2.)
 Paragraphs 7-10, 12-14 and 16-17 cite to *unauthenticated* documents. (Doc. 73-1 at 3-7.)

Plaintiff also violated LRCiv 56.1(e), which requires a party to cite to the specific
 paragraph in his statement of facts that supports each assertion of fact in his
 memorandum.¹ (Doc. 71.) Plaintiff's memorandum does not include any citations to his

¹ The Court also reminded Plaintiff of this requirement in its Order. (Doc. 37 at 3.)

1 PSOF or to his PCSOF. (*Id.*) Instead, Plaintiff’s memorandum cites to his Complaint and
 2 to unauthenticated documents attached to his memorandum.² (*Id.* at 8, 10-12, 15.)

3 This Court denied Plaintiff’s last request for a *nunc pro tunc* Order in this case,
 4 quoting *In re Miller*, 620 B.R. 637, 640 (Bankr. E.D. Cal. 2020) (cleaned up), as follows:

5 Federal courts may issue *nunc pro tunc orders*, or ‘now for then’ orders, to
 6 reflect the reality of what has already occurred[.] Such a decree presupposes
 7 a decree allowed, or ordered, but not entered, through inadvertence of the
 8 court. Put colorfully, *nunc pro tunc* orders are not some Orwellian vehicle for
 revisionist history - creating ‘facts’ that never occurred in fact. Put plainly,
 the court cannot make the record what it is not.

9 (Doc. 29 at 1.) At the time, the Court noted that Plaintiff “gives no explanation why a
 10 *nunc pro tunc* Order is appropriate now.” (*Id.* at 2.)

11 Here, Plaintiff does not explain why he waited to file the instant motion until 53
 12 days after filing the Response without a controverting statement of facts. (Doc. 73.) He
 13 does not explain why he waited 36 days after Defendants pointed out his failure in their
 14 Reply. (*Id.*) He does not explain why the Court should grant him leave to file the PSOF
 15 and PCSOF when his memorandum does not reference either, as LRCiv 56(e) requires.
 16 (*Id.*) And he does not explain why the Court should allow him to file a statement of facts
 17 that does not follow LRCiv 56(b). (*Id.*) In short, once again Plaintiff fails to explain “why
 18 a *nunc pro tunc* Order is appropriate now.” (*See* Doc. 29 at 2.)

19 **III. Conclusion**

20 Plaintiff has not shown that this Court should allow him to file a statement of facts
 21 that does not follow local rules over a month after the motion was deemed ready for
 22 decision. Based on the foregoing, Defendants respectfully request that this Court deny
 23 Plaintiff’s motion (Doc. 73).

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 27 ² Plaintiff does not explain how “a clerical error during the ECF filing process”
 28 could lead to Plaintiff’s memorandum being filed *with* citations to documents attached
 thereto and *without* citations to his PSOF and PCSOF. (Doc. 73.)

1 RESPECTFULLY SUBMITTED: August 26, 2024.

2 GARY M. RESTAINO
3 United States Attorney
4 District of Arizona

5 *s/ Denise Ann Faulk*
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8 Copy of the foregoing
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18 / Resp to MF Leave to File SOF - ND
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